Filed 8/24/09 P. v. Farooqi CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PASHTOON FAROOQI, Defendant and Appellant.	G041045 (Super. Ct. No. 08NF0982) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed and remanded with directions to modify.

Douglas G. Benedon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Meredith A. Strong, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Pashtoon Farooqi appeals from a judgment entered after a jury found him guilty of false imprisonment by violence, assault, and two counts of sexual battery. Defendant admitted he had been previously convicted of a serious and violent felony within the meaning of Penal Code section 667, subdivisions (d) and (e) and section 1170.12, subdivisions (b) and (c)(1).

Defendant contends the trial court erred by (1) admitting evidence of defendant's prior sexual offenses under Evidence Code section 1108 (all further statutory references are to the Evidence Code unless otherwise specified); (2) instructing the jury with a modified version of CALCRIM No. 1191, which he argues violated his due process rights and unconstitutionally lessened the prosecution's burden of proof; and (3) miscalculating defendant's presentence custody credits.

We affirm. We conclude the trial court did not err by (1) admitting evidence of defendant's prior sexual offenses or (2) instructing the jury with CALCRIM No. 1191. In *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), the California Supreme Court held that the 1999 version of CALJIC No. 2.50.01 was constitutional. The version of CALCRIM No. 1191, given to the jury in this case, contains substantially similar language to that in the version of CALJIC No. 2.50.01 which was approved by the Supreme Court in *Reliford*.

As conceded by the Attorney General with respect to point (3), the trial court erred in calculating defendant's good time/work time credits. We therefore remand this matter to the trial court to modify the judgment and amend the abstract of judgment to reflect that defendant accrued 142 days of good time/work time credits.

FACTS

I.

THE CHARGED OFFENSES

At 3:00 p.m. on December 22, 2007, Sherry C. left the motel where she lived to go to the store. She was walking down Beach Boulevard when defendant pulled up next to her while riding his bicycle; he started speaking to her in a language she did not understand. Sherry C. thought defendant was trying to communicate that he wanted her to get on his bicycle with him; she did not want to get on his bicycle and wanted to be left alone. Defendant blocked her path, grabbed her breast, and squeezed "too hard." She pushed him aside and continued to walk down the street.

After purchasing a bottle of water, Sherry C. started to walk back on the opposite side of Beach Boulevard. Defendant suddenly appeared, grabbed her wrist, and dragged her into a carport; Sherry C. testified he "sound[ed] angry about something." Sherry C. struggled with him and repeatedly stated, "[l]et go of me." Defendant shoved her against a wall in the carport. He showed her a handful of money and a condom, and told her something to the effect of "this won't take long." She believed he was planning to rape her. Sherry C. testified that she did not consent to defendant's touching and had not discussed any sort of prostitution arrangement with him.[1] Sherry C. stepped on defendant's foot, pushed him back, and ran back to the street. She saw three acquaintances on the other side of the street and "holler[ed]" to them, "somebody call the police." A police officer drove by at that moment and Sherry C. flagged him down.

[1] Sherry C. has been convicted of prostitution multiple times and lived in an area known for prostitution. She testified at trial that she was not working on December 22, 2007. During trial, Sherry C. had a pending case against her in which she was charged with prostitution. She was offered immunity with regard to her testimony in the instant case.

Later that afternoon, defendant rode his bike toward Megan S. who was walking along Beach Boulevard.[2] Defendant passed Megan S., then turned around and started walking behind her. Defendant "hailed" her or "just said, hey" to get her attention. Megan S. did not say hello back, but kept walking. Defendant asked Megan S. to go with him to a parking lot behind a building. She assumed he was hitting on her and she said no. He said, "come on, come on with me" and offered to give her $60 to go behind the building with him. Megan S. responded, "[y]ou've got to be out of your fucking mind." Defendant got off his bike and continued to follow her down the street; Megan S. kept walking.

Defendant then asked Megan S.: "[D]o you have a room? Let's go to your room." She did not respond and kept walking. She felt defendant grab her buttocks as he walked beside her. She said, "[w]hat the fuck" and turned toward defendant. She saw Officer Matthew Beck of the Anaheim Police Department nearby and thought he must have seen what defendant did; she mouthed to Beck, "what are you going to do?"

Beck testified he saw defendant try to speak with Megan S. and that Megan S. was not responding to him. He also saw defendant walking with his bike, defendant grab Megan S.'s buttocks, and Megan S. attempt to slap defendant's hand away. Beck got out of his patrol car and contacted defendant and Megan S.

Beck asked defendant why he had grabbed Megan S.'s buttocks. Defendant said he believed she was a hooker. Beck asked defendant whether he had attempted to touch any other women on Beach Boulevard that day. Defendant said he "didn't remember" and "had a bad memory." At the time of his arrest, defendant was carrying a condom in his wallet, a condom in his jacket, and $104 in cash.

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[2] Megan S. has also been convicted of prostitution. Megan S. testified she was not working that day and had not worked as a prostitute "for quite a[while]."

II.

DEFENDANT'S PRIOR SEXUAL OFFENSES

The trial court granted the prosecution's motion pursuant to section 1108 to admit evidence of defendant's prior sexual offense against Sally T. in December 1995 and his prior sexual offense against A.C. in May 1996. After the motion was granted, the prosecutor and defendant's counsel stipulated to the following regarding defendant's prior sexual offense against Sally T.: "That on April 1st, 1996, the defendant pled guilty to a violation of California Penal Code section 220, assault with intent to commit rape, and offer the following statement as a factual basis for the plea: On December 23rd, 1995, in Orange County, I assaulted Sally T[.] with the specific intent to rape her."

A.C. testified regarding defendant's prior sexual offense against her. Around noon on May 14, 1996, A.C. was outside on Stewart Street in Garden Grove with her young son when defendant approached her and began speaking to her. A.C. could not understand defendant except that he was saying something about money. Believing defendant intended to rob her, A.C. showed him what money she had with her. Defendant shook his head, indicating he did not want her money, and, with both hands, grabbed her buttocks "hard," then pushed her against a metal screen. A.C. was "really scared." She struggled with defendant and asked, "what's going on?" He refused to let go of her when she tried to get away from him. Defendant let her go and ran off when a man passed by them. A.C. immediately told her husband what had happened and law enforcement in the area apprehended defendant.

BACKGROUND

Defendant was charged in an amended information with one count of false imprisonment by violence in violation of Penal Code sections 236 and 237, subdivision (a) (count 1), one count of assault with intent to commit a sexual offense in violation of Penal Code section 220, subdivision (a) (count 2), and two counts of sexual

battery in violation of Penal Code section 243.4, subdivision (e)(1) (counts 3 and 4). The information alleged that, pursuant to Penal Code sections 667, subdivisions (d) and (e)(1) and 1170.12, subdivisions (b) and (c)(1), defendant was previously convicted in 1996 of a serious and violent felony (assault with an intent to commit rape in violation of Penal Code section 220). The information also alleged defendant had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).

The jury found defendant guilty as charged on counts 1, 3 and 4. As to count 2, the jury found defendant guilty of the lesser included offense of assault. The trial court found the prior conviction and prior prison term allegations true.

The trial court sentenced defendant to a total prison term of eight years calculated by (1) imposing a six-year term on count 1 (double the upper term); (2) suspending sentence as to counts 2, 3 and 4; and (3) imposing two consecutive one-year terms for the two prior prison term allegations. The court determined defendant had served 287 actual days in custody and had accrued 58 days of work time credits under Penal Code section 2933.1. Defendant appealed.

DISCUSSION

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF DEFENDANT'S PRIOR SEXUAL OFFENSES UNDER SECTION 1108.

Defendant argues the trial court abused its discretion by admitting evidence of his prior sexual offenses against A.C. and Sally T. under section 1108 because the probative value of such evidence was substantially outweighed by the probability it would create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury within the meaning of section 352. As discussed in detail *post*, the trial court did not abuse its discretion.

Section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." As a general rule, disposition or propensity evidence offered to prove a defendant's conduct on a specific occasion is not admissible. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) "In 1995, the Legislature enacted section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases" (*ibid*.) because it "determined the need for section 1108 was '"critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial'" (*id.* at p. 918).

In *People v. Falsetta, supra,* 21 Cal.4th 903, the defendant argued section 1108 violated his constitutional right to due process. The California Supreme Court disagreed, stating, "'[s]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . section 352. [Citation.] . . . This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] *With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause*.' [Citation.]" (*People v. Falsetta, supra,* at pp. 917-918; see *People v. Lewis* (2009) 46 Cal.4th 1255, 1288-1289.) The Supreme Court further concluded, "[n]or does section 1108 improperly alter or reduce the prosecutor's proof burden. As stated in [*People v.*]*Fitch* [(1997) 55 Cal.App.4th 172, 182-183], 'While the admission of evidence of the uncharged sex offense may have added to the evidence the jury could consider as to defendant's guilt, it did not lessen the prosecution's burden to prove his guilt beyond a reasonable doubt.'" (*People v. Falsetta, supra,* at p. 920; see *Reliford, supra,* 29 Cal.4th 1007, 1009 ["In *People v. Falsetta* . . . , we rejected a due process challenge to Evidence

Code section 1108, which allows evidence of the defendant's uncharged sex crimes to be introduced in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes"].)

Section 352 provides the trial court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The California Supreme Court, in *People v. Falsetta, supra*, 21 Cal.4th at pages 916-917, stated the trial court's "careful weighing process under section 352," before admitting evidence under section 1108, involves consideration of "its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1121 [trial court's decision to admit evidence under section 352 is reviewed for abuse of discretion]; *People v. Williams* (1997) 16 Cal.4th 153, 213 [same].)

Defendant contends the trial court abused its discretion by admitting evidence of his prior sexual offenses because its probative value was substantially outweighed by the probability its admission would create substantial danger of undue prejudice, confuse the issues, or mislead the jury. Defendant argues the evidence of the prior sexual offenses had "minimal probative value" because they occurred long ago in 1995 and 1996. Defendant also argues admission of evidence of both offenses was unduly prejudicial because the prior offenses were more egregious than the charged offenses in this case. He further argues admission of the evidence of his prior sexual

offense against A.C. risked misleading the jury because there was no evidence presented to the jury that he was ever punished for that offense which led "the jury to punish him for that offense in this case." Defendant also contends evidence of the prior sexual offenses was "highly inflammatory" in that the jury was informed that he committed assault with an intent to commit rape against Sally T. and assaulted A.C. in the presence of her young son.

We begin our analysis by observing that the evidence of defendant's prior sexual offenses had significant probative value. Defendant's prior sexual offenses showed defendant had previously assaulted women in a sexual manner. Defendant's assault on Sally T. was sexual in nature: he admitted he assaulted her with an intent to commit rape against her. Furthermore, the circumstances of his assault against A.C. resembled the circumstances of the charged offenses. A.C. testified she was outside one afternoon when defendant approached her, said something about money, struggled with her, grabbed and squeezed her buttocks "hard," and pushed her against a metal screen.

Similarly, the evidence at trial here showed defendant approached Sherry C. while she was walking down a city street one afternoon, blocked her way, and grabbed and squeezed her breast "too hard." A short time later, defendant approached Sherry C. a second time on the street, grabbed her wrist, pulled her into carport, showed her money and a condom, and shoved her against a wall. The evidence also showed defendant approached Megan S. that same afternoon while she was walking down the street. He asked her to go behind a building or go to her room with him. When she refused, defendant grabbed her buttocks. The evidence of defendant's prior sexual offenses was therefore undoubtedly probative to show defendant had a propensity to sexually assault women.

Defendant does not contend the admission of the evidence necessitated an undue consumption of time. Indeed, the record shows the prosecution's presentation of the evidence on the prior sexual offenses was brief. The evidence of defendant's assault

with an intent to commit rape against Sally T. involved one page of the reporter's transcript and the evidence of his assault against A.C. involved less than nine pages of the reporter's transcript. (*People v. Pierce* (2002) 104 Cal.App.4th 893, 901 ["Little time was devoted to the prior offense; it involved only 17 pages of transcript"].)

Defendant's argument that the prior sexual offenses evidence created a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury is not supported by the record. First, defendant contends the jury would have been tempted to punish defendant in this case for his prior sexual offense against A.C. However, A.C. testified that after defendant assaulted her, a patrol car was passing by and they "got him," which strongly suggested to the jury that defendant was apprehended and prosecuted appropriately.[3]

Second, defendant contends the prior sexual offenses were too remote in time from the charged offenses. Although those offenses occurred 11 and 12 years before the charged offenses, "[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.) In *People v. Pierce*, *supra*, 104 Cal.App.4th at page 900, the defendant argued the trial court abused its discretion by admitting evidence concerning a prior 23-year-old rape conviction. The appellate court disagreed with the defendant's argument the prior offense was too remote, stating: "Here the trial court carefully weighed the remoteness issue with a series of other factors. It found remoteness was 'the only plus for the defendant's side,' but the prior conviction was 'highly relevant.' It showed 'a propensity to commit sexual offenses against young women.' Moreover, [the defendant] had been incarcerated for at least 12 years after the 1977 rape.

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[3] Defendant does not argue that there was any question he committed the prior sexual offenses. As discussed *ante*, evidence was presented at trial that he pleaded guilty to committing an assault with intent to commit rape against Sally T. At the time the trial court ruled that evidence of the prior sexual offenses should be admitted, the court was aware defendant had also been convicted for his assault on A.C.

[¶] [The defendant] has not shown error. '[S]ubstantial similarities between the prior and the charged offenses balance out the remoteness of the prior offenses. [Citation.]' [Citation.] Here there are substantial similarities between the two offenses and the two victims. [The defendant] attacked . . . two young women who were alone on city streets at night. He put his hand over their mouths, told them to shut up or keep quiet, and dragged them near bushes or dark areas. . . . [¶] . . . The trial court could reasonably infer that the similarities were substantial enough to 'balance out the remoteness' in favor of admission of the prior offense." (*Ibid.*)

Here, during the hearing on the prosecution's motion to admit evidence under section 1108, the trial court observed: "As a consequence of the A[.C.] matter, I was informed by counsel that [defendant] was sentenced to six years in state prison. So that would account for certainly a portion of the time that has passed since 1996 when these two incidents took place. [¶] I do not believe that, considering the nature of the allegations of conduct, rape, sexual assault, false imprisonment, that these cases are so old they should be precluded from the jury's consideration on that basis." (See *People v. Pierce, supra,* 104 Cal.App.4th at p. 900.)

Finally, the evidence of defendant's prior sexual offenses was not so inflammatory that its probative value was substantially outweighed by its prejudicial impact. Although the jury was informed defendant pleaded guilty to committing the crime of assault with an intent to commit rape against Sally T., the jury was not provided any graphic details or any other information about that offense.

The jury was also informed that A.C.'s young son was present when defendant had assaulted her. But that fact was not belabored in A.C.'s brief trial testimony and was relevant to show the brashness of defendant in his commission of sexual offenses against women going about their business in broad daylight. In any event, any prejudice created by the admission of such evidence did not substantially outweigh its probative value. We find no abuse of discretion.

II.

THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY WITH CALCRIM NO. 1191.

Defendant contends the trial court erred by instructing the jury with a modified version of CALCRIM No. 1191 because that instruction violated his rights to due process and a fair trial by allowing the jury to (1) find the fact of the prior crimes true and to infer predisposition using a preponderance of the evidence standard and, (2) infer his guilt of the charged offenses merely from propensity evidence. Defendant further argues the modified version of CALCRIM No. 1191 unconstitutionally relieved the prosecution of its burden to prove every element of the charged offenses beyond a reasonable doubt.

The trial court instructed the jury with a modified version of CALCRIM No. 1191, which stated: "The People presented evidence that the defendant committed the crimes of sexual battery and assault with intent to commit rape that were not charged in this case. These crimes are defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the *defendant was likely to commit and did commit the sex offenses, as charged here.* If you conclude that the defendant committed the uncharged offenses, *that conclusion is only one factor to consider along with all the other evidence.*

It is not sufficient by itself to prove that the defendant is guilty of the charged sex offenses. The People must still prove each charge beyond a reasonable doubt. [¶] If you decide that the defendant committed the other sexual offenses, you may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed assault with intent to commit rape and sexual battery. *Remember, however, that evidence of another sexual offense is not sufficient alone to find the defendant guilty of assault with intent to commit rape and sexual battery. The People must still prove each element of assault with intent to commit rape and sexual battery beyond a reasonable doubt.* [¶] Do not consider this evidence for any other purpose than the purpose identified in these instructions." (Italics added.)

In *Reliford, supra*, 29 Cal.4th at pages 1009, 1015-1016, the California Supreme Court rejected the same arguments asserted by defendant and upheld the validity of the 1999 version of CALJIC No. 2.50.01 which contained similar language to that contained in CALCRIM No. 1191. Like CALCRIM No. 1191, the 1999 version of CALJIC No. 2.50.01, as given in *Reliford*, stated in relevant part: "'If you find that the defendant committed a prior sexual offense in 1991 involving [the victim], you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he *was likely to commit and did commit the crime of which he is accused.* [¶] *However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense in 1991 involving* [*the victim*], *that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime.* The weight and significance of the evidence, if any, are for you to decide.'" (*Reliford, supra,* 29 Cal.4th at p. 1012, italics added.)

In *Reliford, supra*, 29 Cal.4th at page 1015, the Supreme Court held, "no juror could reasonably interpret the instructions to authorize conviction of a charged offense based solely on proof of an uncharged sexual offense. It is not possible, for

example, to find each element of the charged crimes, as the jury was instructed to do before returning a guilty verdict, based solely on the [uncharged] offense. Nor is it possible to find a union or joint operation of act or conduct and the requisite intent for each charged crime, as the jury was also instructed to do. Hence, no reasonable jury could have been misled in this regard. [Citation.]" The court further stated, "[w]e do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense . . . . The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty 'beyond a reasonable doubt.' [Citations.] . . . The jury thus would have understood that a conviction that relied on inferences to be drawn from defendant's prior offense would have to be proved beyond a reasonable doubt." (*Id*. at p. 1016; see *People v. Lewis, supra,* 46 Cal.4th at p. 1298 ["as in *Reliford*, we conclude there is no reasonable likelihood that the jury interpreted the instructions as a whole to authorize a conviction based upon proof by a preponderance of the evidence that defendant committed the uncharged offenses"].)

In *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87, the appellate court rejected the defendant's constitutional challenge to CALCRIM No. 1191, based on *Reliford, supra,* 29 Cal.4th 1007, stating: "As to defendant's challenge to the instruction, it is based on his assertion that the instruction on the use of prior sex offenses 'wholly swallowed the "beyond reasonable doubt" requirement.' The California Supreme Court has rejected this argument in upholding the constitutionality of the 1999 version of CALJIC No. 2.50.01. [Citation.] The version of CALJIC No. 2.50.01 considered in *Reliford* is similar in all material respects to . . . CALCRIM No. 1191 (which was given here) in its explanation of the law on permissive inferences and the burden of proof. We are in no position to reconsider the Supreme Court's holding in *Reliford* [citation], and by

analogy to *Reliford*, we reject defendant's argument regarding the jury instruction on use of his prior sex offenses." (Fn. omitted.)

In *People v. Cromp* (2007) 153 Cal.App.4th 476, 480, the appellate court upheld the validity of CALCRIM No. 1191, stating: "Although the instruction considered in *Reliford* was the older CALJIC No. 2.50.01, there is no material difference in the manner in which each of the instructions allows the jury to conclude from the prior conduct evidence that the defendant was disposed to commit sexual offenses and, therefore, likely committed the current offenses. CALCRIM No. 1191, as given here, cautions the jury that it is not required to draw these conclusions and, in any event, such a conclusion is insufficient, alone, to support a conviction. Based on *Reliford*, we therefore reject defendant's contention that the instruction violated his due process rights."

Defendant cites *People v. James* (2000) 81 Cal.App.4th 1343, 1346-1347, 1349, in which the appellate court concluded the 1997 version of CALJIC No. 2.50.02, which instructed on consideration of prior instances of domestic violence, violated due process "by increasing the likelihood the jury would misuse evidence of prior offenses, opening the door to conviction based merely on propensity." Defendant also cites *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 821-822, in which a panel of the Ninth Circuit Court of Appeals found the 1996 version of CALJIC No. 2.50.01 constitutionally infirm.

The challenged instructions at issue in *People v. James, supra,* 81 Cal.App.4th 1343, 1350 and in *Gibson v. Ortiz, supra,* 387 F.3d 812, 821-822, instructed the jury that if it found that the defendant had the disposition to commit the same or similar type of offense as the charged offenses based on its finding the defendant had committed certain other offenses, it was permitted to infer the defendant "'was likely to commit and did commit'" the charged crime or crimes. The instructions in those cases did not include the critical language contained in the 1999 version of CALJIC No. 2.50.01 at issue in *Reliford* and in the version of CALCRIM No. 1191 at issue here—any jury finding that the defendant committed the uncharged offenses is insufficient by

itself to prove beyond a reasonable doubt that the defendant is guilty of each charged offense. *People v. James, supra*, 81 Cal.App.4th 1343 and *Gibson v. Ortiz, supra*, 387 F.3d 812, 821-822, are therefore inapposite.

III.

DEFENDANT'S PRESENTENCE CUSTODY CREDITS WERE MISCALCULATED.

Defendant contends the trial court erroneously applied Penal Code section 2933.1, subdivision (c) in calculating his presentence custody credits. Defendant contends the 15 percent limitation on presentence conduct credits under Penal Code section 2933.1 did not apply because he was not convicted of a violent felony listed in Penal Code section 667.5, subdivision (c) as required by Penal Code section 2933.1, subdivision (c). The Attorney General concedes that the trial court erred by awarding defendant only 58 days of conduct credits under Penal Code section 2933.1 instead of 142 days of conduct credits under Penal Code section 4019.

Penal Code section 2933.1, subdivision (a) provides: "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in Section 2933." Here, defendant was convicted of a single felony for false imprisonment. False imprisonment is not a felony offense listed in Penal Code section 667.5, subdivision (c). Therefore, Penal Code section 2933.1 did not apply in this case.

Under Penal Code section 4019, "[a] convicted felon is eligible for a one-day credit for performing work and another one-day credit for complying with regulations for every six-day period during which he or she is confined in or committed to a county jail prior to sentencing. A minimum commitment of six days is required to earn good/work credits. If the six-day commitment minimum is met, for every four days spent in actual custody, a term of six days is deemed served. [Citation.] [¶] The proper

method of calculating presentence custody credits is to divide by four the number of actual presentence days in custody, discounting any remainder. That whole-number quotient is then multiplied by two to arrive at the number of good/work credits. Those credits are then added to the number of actual presentence days spent in custody, to arrive at the total number of presentence custody credits." (*People v. Culp* (2002) 100 Cal.App.4th 1278, 1282-1283, fns. omitted.)

Here, as of the date of the sentencing hearing, defendant served 287 days of actual time. Applying the formula set forth in Penal Code section 4019 to determine the number of good time/work time credits defendant should have been awarded, defendant and the Attorney General agree defendant should have received 142 days of good time/work time credits. Adding to that number defendant's 287 days of actual time served, defendant had accrued a total time of 429 days of presentence custody credits. We therefore direct the trial court on remand to modify the judgment and amend the abstract of judgment to reflect the correct number of good time/work time credits and total presentence custody credits to which defendant is entitled. (*People v. Duran* (1998) 67 Cal.App.4th 267, 270 [appellate court may correct errors in calculating presentence credits upon the request of any party "so long as it is not the only issue on appeal"].)

DISPOSITION

We remand and direct the trial court to modify the judgment to credit defendant with 287 days of actual time served plus 142 days of good time/work time credits for a total of 429 days of presentence custody credits, prepare an amended abstract

of judgment, and forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, we affirm the judgment.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.